IN THE

Supreme Court of the United States

77-1521

No. Misc.

GERALD MARKER, *et al.*,

Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INC., *et al.*,

Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,

Respondents (Defendants).

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

AND

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

GODFREY P. SCHMIDT
Suite 1606
654 Madison Avenue
New York, New York 10021
(212) 371-7290

GLENN H. CARLSON
Perito, Duerk and Carlson, P.C.
Suite 1200
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8300

Attorneys for Movants/Petitioners

April 24, 1978

INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. Misc.

GERALD MARKER, *et al.*,
Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INC., *et al.*,
Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,
Respondents (Defendants).

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now come the Petitioners and respectfully move this Court for leave to file the annexed Petition for Writ of Certiorari under Section 1651 of Title 28, United States Code, which Petition is directed to the United States Court

of Appeals for the District of Columbia Circuit, to review the Order of that Court entered December 21, 1977 and upon which rehearing was denied on January 23, 1978, all as more particularly described in the Petition, and for such other and further relief as may be just and proper.

Dated: April 24, 1978

GODFREY P. SCHMIDT
Suite 1606
654 Madison Avenue
New York, New York 10021
(212) 371-7290

GLENN H. CARLSON
Perito, Duerk and Carlson, P.C.
Suite 1200
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8300

Attorneys for Movants/Petitioners

IN THE
Supreme Court of the United States

No. Misc.

GERALD MARKER, *et al.*,
Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INC., *et al.*,
Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,
Respondents (Defendants).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, pursuant to 28 U.S.C. 1651(a), pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the District of Columbia Circuit entered on December 21, 1977, and upon which rehearing was denied on January 23, 1978. The earlier Order struck Petitioner's "Brief for Intervenors-Appellees", filed and served pursuant to Rules 28 and 31, F.R.A.P. on November 16, 1977.

OPINION BELOW

The United States Court of Appeals for the District of Columbia Circuit did not write any opinion relevant to this Petition. The subject Orders are set forth in the simultaneously submitted and separate Appendix, pp. 1a and 3a (hereinafter "App." followed by the page number).

JURISDICTION TO REVIEW

The Court of Appeals Order denying rehearing of the Court of Appeals was entered on January 23, 1978. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a)[1] or, in the alternative, pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves Federal Rules of Appellate Procedure ("F.R.A.P.") Rules 28 and 31 and specifically, Rules 28(b), 28(c), 28(h), and 31(a) thereof. These two Rules appear in full at App. 54a and 57a, respectively.

[1]See, House v. Mayo, 324 U.S. 42 (1945); Steffler v. United States, 319 U.S. 38 (1943); McClellan v. Carland, 217 U.S. 268 (1909).; DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1910); and United States Alkali Export Association, Inc. v. United States, 325 U.S. 196 (1945). See also Head v. California, 374 U.S. 509 (1963).

QUESTIONS PRESENTED

1. By striking Petitioners' "Brief for Intervenors-Appellees", did the Court of Appeals violate Rules 28 and 31, F.R.A.P., thus precluding Petitioners (as Appellees) from answering the arguments set forth in Appellants' Brief?

2. Where a full panel of the Court of Appeals had on December 17, 1976, unanimously and in all respects affirmed the District Court's Order granting Petitioners intervention, did a two-judge panel of the Court below (including *only* one judge of the original panel) have power, on December 21, 1977, during the pendancy of no relevant appeal, to modify and curtail both the District Court's intervention order and the full panel's affirmance thereof?

3. By striking said Brief (filed pursuant to Rules 28 and 31, F.R.A.P.) did the Court of Appeals deprive Petitioners (as Appellees) of procedural due process under the Fifth Amendment to the Constitution of the United States?

4. By striking said Brief, did the Court of Appeals impair or frustrate the future jurisdiction of this Court?

STATEMENT OF THE CASE

A. *The Underlying Complaint.* On May 1, 1973, ten international and national unions, each a member of the American Federation of Labor-Congress Industrial Organizations, filed in the United States District Court of the District of Columbia a complaint against the National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") and the National Right to Work Committee ("Committee"), both hereinafter sometimes referred to as defendants. The complaint, an amended complaint and a second amended complaint requested in two counts injunc-

tive and declaratory relief and compensatory damages for alleged violations of the Labor Management Reporting and Disclosure Act ("LMRDA"), specifically Sections 101(a)-(4) and 203(b) thereof [29 U.S.C. §411(a)(4) and 29 U.S.C. §433(b)]. Jurisdiction of the Distict Court was claimed under 28 U.S.C. §2201 (declaratory relief), 28 U.S.C. §2202 (relief ancillary to declaratory relief), 29 U.S.C. §412 (relief for persons aggrieved by infringement of their rights under LMRDA), 28 U.S.C. §1331 (Federal questions involving more than $10,000.00) and 28 U.S.C. §1337 (civil actions arising under Acts of Congress regulating commerce).

The First Count of the complaint sought to prevent Foundation from continuing legal aid to Petitioners, among others, in actions against unions in other jurisdictions. Without such aid, Petitioners would not be able to finance their meritorious actions in other courts. That count of the second amended complaint relies entirely upon the second proviso in Section 101(a)(4) LMRDA. Petitioners' interest in the litigation is confined to that first count. On January 9, 1976, Petitioners, numbering sixteen, moved, in the District Court, to intervene as Defendants. All but two of the movants alleged receipt of Foundation's legal aid, and the other two were then in the process of requesting such aid, and have since received it.

B. *Judicial History Immediately Relevant to this* Petitioners permissive intervention. (App. 51a.) That Order was affirmed by the Court below (App. 49a). It explicitly limited intervention to two purposes:
explicitly limited intervention to two purposes:

> [1] for the limited purpose of submitting evidence on the question of whether the plaintiffs set forth in paragraph ten of the amended complaint were at the time of these actions union-member employees and

> [2] *for the purpose of submitting briefs on legal questions extant.* [Emphasis supplied.]

Petitioners rely here on the second purpose.

Pursuant to invitation of the District Court to all parties, Petitioners submitted lengthy Memoranda[2] of law on May 3 and May 10, 1977. No objection to the filing of such Memoranda was made by either the District Court or Plaintiffs' counsel.

On June 2, 1977, the District Court filed its Order and Opinion (App. 38a and 21a, respectively) granting summary judgment against plaintiff unions. This precipitated three appeals: one by Petitioners (Docket No. 77-1739) as Intervenors-Appellants; one by Plaintiffs-Appellants (Docket No. 77-1766); and one by Defendants-Appellants (Docket No. 77-1767). (App. 13a, 19a, and 9a and 6a respectively). Petitioners (as Intervenors) filed their Notice of Appeal on July 5, 1977; it was given *Docket No. 77-1739*, a number applicable to Petitioners *only* as Intervenors-*Appellants.* Subsequently, the plaintiff unions filed a Motion to strike Intervenors' Notice of Appeal. On September 26, 1977, the Court of Appeals, *per curiam*, entered in Docket No. 77-1739 its Order on that Motion:

> Upon consideration of appellees' [plaintiff unions'] motion to dismiss [petitioners'] appeal, of the responses filed with respect thereto, and it appearing that these appeals draw into question the constitutionality of 29 U.S.C. §411(a)(4), it is
>
> ORDERED by the Court that appellees' aforesaid motion is granted except as to the matters stated on page five of intervenors' notice of appeal filed in the District Court on July 5, 1977 which will be the sole matters to be briefed [by Petitioners as Appellants] in this appeal, and, it is

[2]Intervenors confined their Memoranda of Law in that Court to Count One of the Second Amended Complaint, having no interest in Count Two or in Defendants' Counterclaim.

FURTHER ORDERED by the Court *sua sponte* that the instant case [No. 77-1739] and numbers 77-1766 and 77-1767 are consolidated for consideration of the merits.

The Clerk is directed to send a certified copy of this order to the Attorney General of the United States pursuant to Rule 44 of the Federal Rules of Appellate Procedure.

On November 16, 1977, Petitioners served and filed their "Brief of Intervenors-Appellees". The plaintiff unions filed a motion to strike that Brief.

On December 21, 1977, the Court below in *Docket No. 77-1739* (wherein Petitioners are *appellants*, as distinguished from Docket No. 77-1766 and 77-1767, where Intervenors are *appellees*) entered its *per curiam* Order:

Upon consideration of the [plaintiff unions'] motion to strike the brief of Intervenors-appellees [Petitioners] filed in number 77-1739, of the responses filed with respect thereto, and of the Court having *sua sponte* considered and rejected the additional submissions as a brief of *amicus curiae*, it is

ORDERED by the Court that the motion to strike is granted and counsel shall correct the brief, within ten days from the date of this order, to comply with the order filed herein on September 26, 1977.

Petitioners then filed a Motion for Rehearing, Stay and Clarification upon the Order of December 21. On January 23, 1978, the Court below filed its *per curiam* Order (captioned in Docket Nos. 77-1739, 77-1766 and 77-1767) denying Petitioners' Motion for Rehearing, etc.:

[3]While Petitioners' printed Brief below agreed with the District Court's holding that, as applied by plaintiff unions, 29 U.S.C. §411(a)(4) is unconstitutional, most of Petitioners' arguments contended that summary judgment in favor of Defendants was justified on non-constitutional grounds, particularly grounds of statutory construction.

Counsel for Intervenors' (Gerald Marker, *et al.*) have filed a motion for rehearing, stay and clarification, and exhibits thereto. On consideration thereof, it is

ORDERED by the Court that the Motion for rehearing, stay and clarification is denied. Counsel for intervenors/appellants/cross-appellees [Petitioners] Gerald Marker, et al., shall, within seven days of the date of this order, file a brief addressing only the single issue specified on page 5 of their notice of appeal, III J.A. 951, in lieu of the brief stricken on December 21, 1977. The Court will not entertain an application for stay of mandate or other dilatory pleading. Counsel will file the brief specified, in order to comply with the order of this Court, whatever other pleadings counsel may file.

Counsel for Petitioners did, on January 30, 1978, "file the brief specified", without prejudice to their right to file this Petition. That limited Brief addressed only the subject mandated by the Court of Appeals, and it was filed and served without subsequent objection from any party.

REASONS FOR GRANTING THE WRIT

I. National Importance of the Case

Petitioners' *interest* in this case has been settled by the District Court's intervention Order and its affirmance by the Court below (App. 51a and 49a). Obviously Petitioners stand to lose Foundation's legal aid if the Amended Complaint is sustained on appeal. But Petitioners contend for a decision serviceable as a precedent for all similarly situated employees and union members[4] in need of legal aid as well as for themselves. Thus, issues in which all employees and union members have a vital stake predominate in this case, which personally affects Petitioners as well as thousands of union members and employees unable to afford the cost of litigations against unions. The case is of national importance because it affects these many persons and the just administration of the federal court system and the national labor laws. *United States v. Ruzicka*, 329 U.S. 287 (1946). Further, the legal issues here are unprecedented, important questions of first impression.

[4]The real, primary cause which initiated this litigation was the nationwide existence of (i) dissenting union members, (ii) employees who reject union membership, and (iii) employees who object to paying for the support of unions (which, after all, represent about twenty percent of all U.S. employees). If such dissidents from unionism did not exist, this case could not have arisen. At bottom and as the Complaint shows, the basic controversy in this case is not confined to the Plaintiffs and Defendants named in the Complaint. This controversy is merely a symptom of prior deeper disputes between plaintiff unions and dissident union members aided by Defendants.

II. Abrogation by Court Below of Rules 28 and 31, Federal Rules of Appellate Procedure.

Petitioners as intervenors are *parties* in this case. Rule 24, F.R.C.P., provides the procedural device whereby a stranger to a litigation can present a claim or defense therein and become a *party* for that purpose.[5] By striking Petitioners' Brief, the Court of Appeals' Order divested Petitioners of their rights both as *appellees* and as *parties*, rendering them voiceless in the face of appellant unions. The Court below struck Petitioners' Brief more than a year after the time to appeal the intervention Order of the District Court had expired, and more than a year after the Court of Appeals itself had unanimously and in all respects[6] affirmed that District Court Order.

In so doing, the Court below devalued Petitioners' status and role as intervenors and parties, despite Rules 28 and 31, F.R.A.P., which Petitioners had called to its attention, and which as relevant read:

> Rule 28
>
> (b) *Brief of the Appellee.* The brief of the appellee shall confirm to the requirements of subdivision (a)(1)-(4) . . . .

[5]International Union, Local 289 v. Scofield, 382 U.S. 205 (1965); Sixty-Seventh Minnesota Senate v Beens, 406 U.S. 187 (1972); Fishgold v. Sullivan Drydock Co. Repair Corp., 328 U.S. 275 (1945); Wolpe v. Poretsky, 79 App. D.C. 141, 44 F.2d 505 (1944); Williams v. Morgan, 111 U.S. 684 (1884).

[6]Even this Court refuses to revise a district court's unabused discretion concerning intervention. Re Engelhard & Sons, 231 U.S. 646 (1914). A court of appeals may not use an extraordinary remedy to control the trial court's properly exercised discretion. Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1964); Employers Reinsurance Corp. v. Bryant, 299 U.S. 374 (1936).

(c) *Reply Brief.* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal . . . .

(h) *Briefs in Cases Involving Cross Appeals.* If a cross appeal is filed the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders, the brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

Rule 31

(a) *Time for Serving and Filing Briefs.* The appellant shall serve and file his brief within 40 days. . . . The appellee shall serve and file his brief within 30 days after service of the brief of appellant. . . .

Petitioners complied with these Rules. In striking Petitioners' Brief, the Court below patently violated them, especially Rule 28. It vetoed Petitioners' "brief of the appellee" including their "answer to the brief of the appellant[s]" and their corrective restatement of Appellants' issues. The unions' and Defendants' briefs do *not* contain the entire "argument involved in the appeal" below; Petitioners' "Brief for Intervenors-Appellees" contains many additional arguments with respect to the first cause of action. To bar Petitioners' "issues and argument" and their "answer", as did the Court below, is to truncate the appeal below and to *piecemeal it*,[7] to the prejudice of adequate consideration of

[7]Section 46(c) of the Judicial Code ["Cases and controversies shall be heard and determined by a court or division of not more than three judges. . ."] contemplates the *entire* "case" (as a proper judicial unit) carried to appeal, not arbitrarily selected *parts* thereof. Congress and the *(continued)*

the *whole* case.

Courts have a duty to comply with valid statutes, and insofar as they do *not* comply, they lack authority and abuse their discretion. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

The Court below, by striking Petitioners' Brief, violated the "usages and principles of law" (28 U.S.C. §1651). Until this case, all courts of appeals have consistently accepted briefs from intervenors[8]. No court has ever before rejected an intervenor's brief in circumstances analogous to those obtaining in this unique case. The Court below is, in this respect, out of step with all other courts of appeals in the United States. *Goldlawr, Inc. v. Herman*, 369 U.S. 456 (1962).

(footnote continued from preceding page)

tradition of judicial administration forbid piecemeal litigation. Will v. United States, 389 U.S. 90 (1967); Parr v. United States, 315 U.S. 513 (1956); Cobbledick v. United Stocks, 309 U.S. 323 (1940); Kerr v. U.S. District Court, 426 U.S. 394, (1976); Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943); Bankers Life & Cas. Co. v. Holland, 34 U.S. 379 (1952).

[8]Ex parte Jordan, 94 U.S. 248 (1876); Gumbel v. Pitkin, 113 Picker Min. & Smelting Co., 325 U.S. 335 (1944); and see Footnote numbered Five (5), *supra.*

III. Abdication of Judicial Function By the Court of Appeals.

In striking Petitioners' Brief, the Court below *pro tanto* abdicated its appellate judicial function. Rule 24, F.R.C.P., does not, in the circumstances, authorize it to give Intervenors less than the District Court in the proper exercise of discretion gave them by an Order affirmed by the Court below. The Judicial Code, 28 U.S.C. §46(c) required the Court below to take, and it did take, the "case or controversy", initiated by the notices of appeal. But it took only the part of that "case or controversy" in which the original parties were interested, to the utter neglect of Petitioners as parties and as appellees. To the extent that it rejected Petitioners' Brief, there was an unauthorized renunciation of appellate function.[9]

The full panel of the Court below which on December 17, 1976, affirmed, unanimously and in all respects, the District Court's Order filed March 8, 1976 (allowing Petitioners to intervene in this case) comprised Judges Bazelon, McKinnon and Leventhal. The two-judge panel which unanimously struck Petitioners' Brief comprised Judges McGowan and Leventhal.

None of the original parties at any time or in any way challenged or sought review or reargument of the affirmance of December 17, 1976. The time for review or reargument had long since expired. Thus, the law of the case, firmly established by the District Court and the Court below, is that Petitioners are permissive intervenors (and therefore, *parties*) to whom two courts explicitly gave the right to

[9]See, Connor v. Coleman, 425 U.S. 675 (1976); Ex parte Harley Davidson Motor Co., 259 U.S. 414 (1921); Ex parte Kawato, 317 U.S. 69 (1942).

submit "briefs on the legal questions extant". (App. 53a.)[10] The two-judge panel confiscated that right by the Order here reviewed. Petitioners are unable to discover any justification for such appellate court procedure or any precedent disclosing similar conduct by any Court of Appeals.

IV. Impairment of Future Jurisdiction of This Court.

By striking Petitioners' Brief, the Court below impaired or frustrated the future appellate jurisdiction of this Court. It is the function of Courts of Appeals, especially in cases which (like this one) will inevitably be presented to this Court for review, to prevent obstacles to this Court's jurisdiction and to consider and to rule on all relevant legal issues, properly raised below, which are likely to be considered by this Court. *McClellan v. Carland,* 217 U.S. 268 (1909); *Ex parte Abdu.*, 247 U.S. 27 (1917); *Re Buder,* 271 U.S. 461 (1925);

[10]See transcript of hearing by the District Cout on March 8, 1976 (App. 53a); transcript of the status hearing on April 26, 1977 (App. 41a *et seq.*); Petitioners' Notice of Appeal filed July 5, 1977 below in Docket No. 77-1739 (App. 13a); the Court of Appeals' Order filed September 26, 1977, which recognizes Petitioners' status as appellants (App. 4a); Plaintiffs' Notice of Appeal filed July 1, 1977, in Docket No. 77-1766, which designates Petitioners as Intervenors-Appellees (App. 19a); Defendants' Notice of Appeal filed July 15, 1977 in Docket No. 77-1767 below, which also designates Petitioners as Intervenors-Appellees (App. 6a and 9a); the Court of Appeals Order filed December 21, 1977 in Docket No. 77-1739, wherein the Court refers to plaintiffs' motion to strike the brief of the intervenors-appellees, grants that motion and refuses, *sua sponte*, to allow Petitioners the right to submit its brief as amicus curiae, (App. 3a). Even plaintiff unions designated their motion to strike the brief of Petitioners as a "Motion to Strike the Brief of Intervenors-*Appellees*", and later filed a "Reply Memorandum in support of motion to strike the brief for Intervenors-*Appellees*". [Emphasis supplied.] In short, Petitioners are recognized as appellees, and as appellants.

United States Alkali Export Ass'n, Inc. v. United States, 325 U.S. 196, 202, 203 (1945). Only in this way can intermediate appellate courts properly aid the future jurisdiction of this Court and present to it the fruits of full study and consideration. The Order to which Petitioners object obstructs *complete* consideration of this case on its merits.[11] No valid reason exists for refusal by the Court below to hear Petitioners. *Ex parte United States*, 287 U.S. 241 (1932).

It is incumbent upon the Court below, both as the bridge between district courts and this Court, or as the often final appellate court, to obtain from *all parties* their studied contentions concerning *all* relevant legal issues raised below. This is a requirement of fairness of hearing.[12]

[11]The "Brief of Intervenors-Appellees" (stricken by the court below) probed *fifteen legal issues.* These were classified, listed and numbered in that Brief under the heading, "Statement of Issues Presented for Review" (pp. 1-3). The first group of *four* issues was classified as "Constitutional Issues" (p. 1). Only issue numbered "(1)" in that Group I was covered (in different ways) by both Petitioners and the original parties.

The second group of *seven* issues was denominated "Issues of Statutory Construction" in Petitioners' Brief. None of these was addressed by either plaintiffs or defendants.

The third group of *four* issues was called by Petitioners "Factual Issues" (pp. 2-3). Each of these is a legal question dealing with the absence of substantial evidence in the record to support crucial allegations in the first cause of action set forth in the Amended Complaint. Defendants' brief did cover three of these four legal, non-constitutional issues.

[12]This Court has said:

> *** The purpose of the judicial review is *** to secure a just result with a minimum of technical requirements ***.
>
> To allow intervention *** in the first appellate review proceeding is to avoid "unnecessary duplication of proceedings", and to adhere to the goal of obtaining "a just result with a

(continued)

Unless this is done, the Court below thwarts the possible future jurisdiction of this Court by a determination which fails to reflect adequate consideration of all substantial issues in the case.

Furthermore, remand to the District Court, in the event the constitutional arguments of the original parties fail, would still be unnecessary, if Petitioners' views on statutory construction were to prevail. Petitioners differ emphatically from Defendants, who, in their "Reply Brief for Defendants-Appellees and in Support of their Cross-Appeal", seem to argue that the only proper alternative to an affirmance based on Defendants' arguments is a remand. On the contrary, Petitioners urge that affirmance on *their* arguments (not made in any other brief in this case) is a valid alternative to remand.

(footnote continued from proceeding page)

> minimum of technical requirements." ***
>
> Permitting intervention also insures fairness to the *** intervenor. If intervention is permitted, the parties *** are able to present their arguments on the issues to a reviewing court which has not crystallized its views. *** the salient facts having been resolved and the legal problems answered in this initial review, subsequent litigation serves little practical value to the *** intervenor. In the second appellate proceeding, the Court of Appeals would almost invariably defer to the initial decision as a matter of stare decisis ***. [International Union, Local 289 v. Scofield, 382 U.S. 205, 214 (1965).]

Thus, fairness requires that all parties be heard. Davis v. Merchantville Trust Co., 152 U.S. 590 (1893); Shields v. Utah Idaho C.R. Co., 305 U.S. 177 (1938); Sung v. McGrath, 399 U.S. 33 (1949).

V. Petitioners' Hobson's Choice: Res Judicata or Appeal.

Previously in this litigation, despite their status as Interveners for limited purposes only, Petitioners had submitted briefs on the legal questions extant in the first count of the Complaint. Their participation had been guided by the District Court's Order permitting intervention, and the affirmance of that Order by the Court of Appeals. The recent Order by the Court below striking Petitioners' reply brief and further limiting Petitioners' role creates confusion concerning the *res judicata* effect of this litigation on Petitioners.

An intervenor is bound by future orders pertaining to the matter for which intervention was originally permitted. The intervenor must therefore appeal orders adverse to his interests, and cannot merely amend his petition of intervention to ask for additional relief. *Commercial Electric Supply Co. v. Curtis*, 288 F. 657 (8th Cir. 1923), cert. den. 264 U.S. 709 (1923). The intervenor is subject to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party. *Alexander v. Hillman*, 296 U.S. 222 (1935).

This is not a case in which the petitioner seeks to participate in an appeal simply to establish a precedent applicable to itself, as in *Boston Tow Boat Co. v. U.S.*, 321 U.S. 632 (1944). Here, the effect of the litigation upon intervenor is not simply stare decisis, but res judicata. Therefore, the interest of Petitioners is comparable to that of the intervenor union in *Fishgold v. Sullivan Drydock and Corp.*, 328 U.S. 275 (1946), where this Court's interpretation of a collective bargaining agreement was final and binding. The interpretation of §101(a)(4) of the LMRDA

[29 U.S.C. §411(a)(4)] by the Court below will bind intervenors, as well as plaintiffs and defendants. Individuals financed by the Defendant Foundation are threatened with loss of that support if the Court of Appeals reverses the District Court decision. Thus, Petitioners meet the definition of an "aggrieved party", entitled to participate in an appeal of the lower court's decision. See, *SEC v. U.S. Realty and Improvement Co.*, 310 U.S. 433 (1940); *Port of New York Authority v. Baker, Watts and Co.*, 129 U.S. App. D.C. 173, 392 F.2d 497 (1968). If their participation is prohibited by a revised interpretation of the scope of their intervention, Petitioners will be denied the hearing fundamental to adjudication of their interest, and yet be bound by the result.

VI. Violation of Procedural Due Process by the Court of Appeals.

In foisting this Hobson's choice upon Petitioners, and in faling to allow compliance with Rule 28 and Rule 31, F.R.A.P., the Court of Appeals violated the procedural due process required by the Fifth Amendment to the United States Constitution. This Court has often ruled that parties aggrieved by governmental action are constitutionally entitled to be heard meaningfully: "at a meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. 515, 552 (1965). Petitioners were denuded of their right as parties-appellees to be heard on the merits of the unions' appeal. Petitioners' Brief was stricken, not on the merits, but arbitrarily and summarily by sheer non-compliance with the F.R.A.P. and by anullment of the District Court's affirmed Order (App. 49a) granting Petitioners the right to brief this

important case. Thus, a "substantial, basic and undecided question" is here presented. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). In a "case or controversy" under 28 U.S.C. §46(c), no party or intervenor can be heard effectively *except by brief.* To punish Petitioners, by striking their Brief, for doing what the law allows is patently undue process. *North Carolina v. Pearce,* 395 U.S. 711 (1969).

Moreover, once the Court of Appeals filed its Order affirming, on December 17, 1976 (App. 49a), the District Court's Order of March 8, 1976 (allowing Petitioners to become intervenors), any reversal, modification or partial nullification of that District Court's Order (App. 51a) became a matter beyond the appellate jurisdiction of the Court below, since Plaintiff Unions had failed or refused to appeal from the District Court's grant of permissive intervention to Petitioners. When the Court below issued its Order of December 21, 1977, it exercised unauthorized jurisdiction. *De Beers Consol. Mines, Ltd.*, 325 U.S. 212 (1944); *Will v. United States,* 389 U.S. 90 (1967). At the very least, the Court below failed to remain within its prescribed jurisdiction as an appellate Court.[13]

---

[13]In re Chetwood, 164 U.S. 443 (1897); Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943); United States Alkali Export Ass'n., 325 U.S. 196 (1945); Re Winn, 213 U.S. 458 (1908); Re Buder, 271 U.S. 461 (1925).

It should also be noted that the Court below in effect censored Petitioners' Brief out of appellate consideration, thus violating free speech and free access to the courts, both rights protected by the First Amendment.

VII. Petitioners Have No Remedy Except By This Petition.

No appeal to the Court of Appeals is possible under the Order of that Court (App. 3a). There is no appeal from a court's non-compliance with statute. Petitioners' Motion for Rehearing by that Court was duly made and deined (App. 1a). Even if *arguendo*, appeal were possible, it would be valueless, because the Court below has, in effect, snuffed out Petitioners' arguments and issues at the very threshold and before Petitioners could utter meaningful appeal on the merits of the legal case which Petitioners can make against the first cause of action in the Amended Complaint. *McClellan v. Carland*, 217 U.S. 268 (1909). The Court below having disregarded Petitioners' rights as parties, the abuse of discretion is so aggravated and the absence of remedy is so obvious as to warrant the extraordinary writ which Petitioners seek. *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945).

Because the Court below has at no time written an opinion concerning Petitioners, the latter approached the writing of their papers for their motion below for rehearing with the frustration and thwarted importunity of the protagonist in Franz Kafka's novel, *The Castle.* They could then discover no rationale which justified the striking of their Brief. They are even more in that same quandrary after writing this Petition and after researching the relevant cases.

CONCLUSION

For the foregoing reasons, Petitioners' Motion for Issuance of a Writ of Certiorari should be granted to review the Orders aforesaid of the United States Court of Appeals for the District of Columbia Circuit. Should this Court consider Petitioners' request for extraordinary relief unnecessary, Petitioners respectfully pray that this Petition be treated as a petition for certiorari under the ruling made in *Head v. California*, 374 U.S. 509 (1963).

Respectfully submitted,

GODFREY P. SCHMIDT
Suite 1606
654 Madison Avenue
New York, New York 10021
(212) 371-7290

GLENN H. CARLSON
Perito, Duerk and Carlson, P.C.
Suite 1200
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8300

Attorneys for Movants/Petitioners

Dated: April 24, 1978

IN THE

Supreme Court of the United States

77-1521

No. Misc.

GERALD MARKER, *et al.*,

Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INC., *et al.*,

Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,

Respondents (Defendants).

APPENDIX TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

GODFREY P. SCHMIDT
Suite 1606
654 Madison Avenue
New York, New York 10021
(212) 371-7290

GLENN H. CARLSON
Perito, Duerk and Carlson, P.C.
Suite 1200
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8300

Attorneys for Movants/Petitioners

April 24, 1978

INDEX TO APPENDIX

Order Denying Rehearing, Stay, and Clarification of the Court of Appeals, January 23, 1978

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1739 **September Term, 1977**

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Locals 1093, 558 and 25, et al

Civil Action #839-73

v.

National Right to Work Legal Defense and Educations Foundation Inc., et al

Gerald Marker, et al
Appellants

NO. 77-1766

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Locals 1093, 558 and 25, et al
Appellants

Civil Action #839-73

v.

National Right to Work Legal Defense and Education Foundation, et al

NO. 77-1767

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, and its Locals 1093, 558 and 25, et al

Civil Action #839-73

v.

National Right to Work Legal Defense and Education Foundation Inc., et al
Gerald Marker, et al

BEFORE: McGowan and Leventhal; Circuit Judges

ORDER

Counsel for intervenors' (Gerald Marker, et al) have filed a motion for rehearing, stay and clarification, and exhibits thereto. On consideration thereof, it is

ORDERED by the Court that the motion for rehearing, stay and clarification is denied. Counsel for intervenors/appellants/cross-appellees Gerald Marker, et al., shall, within seven days of the date of this order, file a brief addressing only the single issue specified on page 5 of their notice of appeal, III J.A. 951, in lieu of the brief stricken on December 21, 1977. The Court will not entertain an application for stay of mandate or other dilatory pleading. Counsel will file the brief specified, in order to comply with the order of this Court, whatever other pleadings counsel may file.

Per Curiam

Order of the Court of Appeals Striking the Brief of Intervenors-Appellees, December 21, 1977

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1739 **September Term, 1977**

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Locals 1093, 558 and 25, et al

Civil Action #839-73

v.

National Right to Work Legal Defense and Education Foundation, Inc., et al

Gerald Marker, et al,
Appellants

and consolidated case nos: 77-1766 & 77-1767

BEFORE: McGowan and Leventhal, Circuit Judges

ORDER

Upon consideration of the motion to strike the brief of intervenors-appellees filed in number 77-1739, of the responses filed with respect thereto, and of the Court having *sua sponte* considered and rejected the additional submissions as a brief of *amicus curiae*, it is

ORDERED by the Court that the motion to strike is granted and counsel shall correct the brief, within ten days from the date of this order, to comply with the order filed herein on September 26, 1977.

Per Curiam

Order of the Court of Appeals Limiting Subject Matter of Intervenors-Appellants' Brief in Docket Number 77-1739, September 26, 1977

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1739 **September Term, 1977**

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Locals 1093, 558 and 25, et al

v.

National Right to Work Legal Defense and Education Foundation Inc., et al.,

Gerald Marker, et al.,
Appellants

BEFORE: McGowan and Leventhal, Circuit Judges

ORDER

Upon consideration of appellees' motion to dismiss appeal, of the responses filed with respect thereto, and it appearing that these appeals draw into question the constitutionality of 29 U.S.C. § 411(a)(4), it is

ORDERED by the Court that appellees' aforesaid motion is granted except as to the matters stated on page five of intervenors' notice of appeal filed in the District Court on July 5, 1977 which will be the sole matters to be briefed in this appeal, and, it is

FURTHER ORDERED by the Court *sua sponte* that the instant case and numbers 77-1766 and 77-1767 are consolidated for consideration on the merits.

The Clerk is directed to send a certified copy of this order to the Attorney General of the United States pursuant to Rule 44 of the Federal Rules of Appellate Procedure.

Per Curiam

Supplemental Notice of Appeal of Defendants, July 15, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL UNION UAW, et al., Plaintiffs, v. NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., et al., Defendants, and GERALD MARKER, et al., Intervenors.	)	Civil Action No. 839-73

SUPPLEMENTAL NOTICE OF APPEAL

Without withdrawing or in any wise modifying, amending or otherwise affecting in any way, the Notice of Appeal filed herein July 14, 1977, defendants, the National Right to Work Legal Defense and Education Foundation, Inc. and National Right To Work Committee, as a supplement or addition to the Notice of Appeal, do hereby appeal from the first and second ordering paragraphs of the order of the

United States District Court for the District of Columbia entered June 2, 1977 and from each and every one of the several orders of said Court itemized in the Notice of Appeal filed herein July 14, 1977 insofar as permitted by law and insofar as such orders, or any of them, have been or could be deemed to have been merged into the final order entered June 2, 1977 and, to the extent the same could be deemed to be binding and conclusive on the defendants in any future proceedings herein or any collateral proceedings.

Dated: Washington, D.C.
July 15, 1977

JACKSON, CAMPBELL &
PARKINSON

By /s/ Thomas S. Jackson
Thomas S. Jackson

By /s/ Kenneth W. Parksonson
Kenneth W. Parkinson

1828 L Street, N.W.
Washington, D.C. 20036
(202) 457-1600

JOHN L. KILCULLEN
Kilcullen, Smith & Heenan
1800 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 296-5700

REX H. REED
National Right to Work Legal
Defense and Education Foundation, Inc.
8316 Arlington Boulevard
Suite 600
Fairfax, Virginia 22030
(703) 573-7010

Attorneys for Defendants
National Right to Work Legal
Defense and Education Foundation, Inc. and National Right
to Work Committee

Of Counsel:

WHITNEY NORTH SEYMOUR
CONRAD K. HARPER
DEBORAH E. LYNCH
THOMAS D. WARREN
RICHARD H. DOLAN

Notice of Appeal of Defendants, July 14, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL UNION UAW, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No. 839-73
NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., et al.,	)	
Defendants,	)	
and	)	
GERALD MARKER, et al.,	)	
Intervenors.	)	

NOTICE OF APPEAL

Notice is hereby given that the National Right to Work Legal Defense and Education Foundation, Inc. and National Right to Work Committee, defendants above named, hereby appeal insofar as permitted by law to the United States Court of Appeals for the District of Columbia Circuit from the following orders of the United States District Court for the District of Columbia:

(a) Order entered in this action on the 24th day of October 1973.

(b) Order entered in this action on the 8th day of November 1973.

(c) Order entered in this action on the 3rd day of January 1974.

(d) Order entered in this action on the 5th day of June 1974.

(e) Order entered in this action on the 17th day of December 1975 (i.e., Order directing, *inter alia*, production of documents and answers to plaintiffs' interrogatories.) (f) Order entered in this action on the 19th day of December 1975.

(g) Order entered in this action on the 15th day of January 1976.

(h) Order entered in this action on the 19th day of January 1976 (i.e., Order denying, *inter alia*, oral motion of defendants to modify the Order of January 15, 1976).

(i) Order entered in this action on the 26th day of January 1976.

(j) Order entered in this action on the 8th day of March 1976 (i.e., Order permitting, *inter alia*, amendment to complaint).

(k) Order entered in this action on the 8th day of March 1976 (i.e., Order compelling, *inter alia*, answers to certain to plaintiffs' interrogatories).

(l) Order entered in this action on the 8th day of March 1976 (i.e., Order granting and denying, *inter alia*, motion to compel answers to defendants' interrogatories).

(m) Order entered in this action on the 8th day of March 1976 (i.e., Order granting, *inter alia*, plaintiffs' motion to compel answers to certain interrogatories, directing filing of such answers, reaffirming protective provisions and directing under certain conditions that defendants show cause).

(n) Order entered in this action on the 15th day of March 1976.

(o) Order entered in this action on the 27th day of April 1976.

(p) Order entered in this action on the 6th day of May 1976.

(q) Order entered in this action on the 11th day of May 1976.

(r) Order entered in this action on the 2nd day of June 1977.

Dated: Washington, D.C.
July 14, 1977

JACKSON, CAMPBELL &
PARKINSON

By _____
Thomas S. Jackson

By _____
Kenneth Wells Parkinson

1828 L Street, N.W.
Suite 1111
Washington, D.C. 20036
(202) 457-1600

JOHN L. KILCULLEN
Kilcullen, Smith & Heenan
1800 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 296-5700

REX H. REED
National Right to Work Legal
Defense and Education
Foundation, Inc.
8316 Arlington Boulevard
Suite 600
Fairfax, Virginia 22030
(703) 573-7010

Attorneys for Defendants
National Right to Work Legal
Defense and Education
Foundation, Inc. and
National Right to Work
Committee

Of Counsel:

WHITNEY NORTH SEYMOUR
CONRAD K. HARPER
DEBORAH E. LYNCH
THOMAS D. WARREN
RICHARD H. DOLAN
Simpson, Thacher & Bartlett
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Notice of Appeal of Intervenors, July 5, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL UNION UAW, et al.,:
Plaintiffs,
v. : C. A. No. 839-73

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., et al.,

Defendants.

FILED JUL 5 1977

JAMES F. DAVEY
CLERK

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Intervenors, Gerald Marker, *et al.*, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order of the United States District Court for the District of Columbia, which was filed herein June 2, 1977 but only insofar as said Order holds, finds or otherwise establishes:

> FURTHER ORDERED, that pursuant to Fed.R.Civ.P. 37(b)(2)(A) and the Rule to Show Cause issued by the Court on May 11, 1976, and because defendants have willfully continued to disobey the discovery orders of this Court, it shall be taken as conceded for the purposes of this litigation that a majority of the financial contributors to the defendant National Right to Work Legal Defense and Education Foundation, Inc., are employers that have a concrete interest in and would be affected by the law suits set

forth in paragraph 10 of the second amended complaint as a result of the facts deemed to be established by the Court's Rule 37 Order of January 26, 1976; and it shall further be taken as conceded that a majority of the defendant Foundation's income derives from the contributions of such employers.

And insofar as that Order is explicated, interpreted or extended by the Memorandum Opinion, of same date, to the extent it holds, finds or establishes:

(i) That said Order constitutes *res judicata*, collateral estoppel or statutory construction violative of *Foundation's* right to continue to function as a legal-aid organization.

(ii) That said Order constitutes *res judicata*, collateral estoppel or statutory construction violative of Intervenors' right to continue to receive legal aid from *Foundation.*

(iii) That the second proviso of Section 101(a)(4) LMRDA [49 U.S.C. § 411(a)(4)] constitutes a valid basis for Plaintiffs' first claim as set forth in Count I of the Second Amended Complaint.

(iv) That said first claim is supported by any factual evidence, which would suffice to show a violation of said second proviso by Defendants.

(v) That the said District Court was "forced . . . to invoke certain of the sanctions," against Defendant National Right to Work Legal Defense and Education Foundation, allowed by Rule 37, F.R.C.P.

(vi) That such sanctions were "authorized by Rule 37" F.R.C.P., as constitutionally or reasonably construed.

(vii) That Plaintiffs were in any way "precluded from obtaining . . . evidence crucial to their [invalid] claims".

(viii) That the District Court, as aforesaid, acted lawfully or constitutionally in deeming "established . . . facts, material to Count I" of the properly dismissed

Second Amended Complaint herein; or that it was ever "unjust . . . to require Plaintiffs to prove" any allegations of Count I of the Second Amended Complaint.

(ix) That the Plaintiffs "have established [in this case] all elements of a Foundation violation of . . . [any] . . . proviso to 29 U.S.C. § 411(a)(4) with regard to . . . [any] . . . Foundation-funded lawsuits set forth in paragraph 10 of the Second Amended Complaint".

(x) That Foundation violated any statute or law in giving legal aid to any Plaintiff in any of the 22 actions (in Courts other than the aforesaid District Court) listed on pages 5 and 6 of the District Court's Memorandum Opinion.

(xi) That "the Rule 37 orders entered . . . on January 26, 1976" herein "establish that the Defendant Foundation is an 'interested employer association' . . . "within the meaning of the aforesaid proviso."

(xii) That said Rule 37 orders established or could constitutionally, or consistently with statute, establish "that Defendant Foundation" ever acted "as a conduit to permit 'interested employers' to fund union members in litigation against their labor organization".

(xiii) That said Rule 37 orders established or could, consistently with applicable statutory or constitutional law, establish:

(I) That a majority of the financial contributors to the defendant Foundation are employers who (1) have contracts or other relationships with some of the plaintiff unions herein; (2) are in the same lines of business in which some of the plaintiff unions herein engage in organization; (3) have union security agreements of their own whose validity or operation may be affected by suits which the defendant Foundation is supporting; (4) have contributed to the anti-union

activities of the defendant Committee; and (5) have in other ways manifested their opposition to organized labor.

(II) That such employers have a concrete interest in and would be affected by the lawsuits set forth by plaintiffs in their complaint.

(III) That a majority of the defendant Foundation's funds derive from the contributions of such employers.

(IV) That the financial contributions made by such employers to the Foundation have been given by the Foundation to the plaintiffs in the lawsuits set forth in the complaint for the purposes of financing and encouraging said litigation.

(V) The Foundation (aided by the Committee) has financed, encouraged, managed and participated (other than as a party) in suits instituted by employees and members of labor organizations, which challenge their financial obligations to the union which is their collective bargaining representative. In those activities, the Foundation has been acting as an agent and conduit for employers interested in promoting such suits in order to (1) promote their self-interest in restricting the permissible scope of legality of union security provisions to which they have agreed, been asked to agree, or expect to be required to agree; (2) weaken the dues resources of labor organizations with which they have or anticipate having collective bargaining or other relationships; and (3) generally establish legal limitations on union security and union political activities which enhance union strength *vis-a-vis* such employers.

(xiv) That said Rule 37 orders or the Record in this case establish or could logically or lawfully establish "that Defendant Foundation is an 'interested employer association' within the meaning of the second proviso" of 29 U.S.C. § 411(a)(4).

(xv) That "by financing union members in litigation against labor organizations the Foundation has violated" the aforesaid proviso.

(xvi) That the "Defendant Foundation has also violated the same proviso by acting as a conduit for 'interested employers' and using their financial contribution to fund union members in litigation against their labor organization".

(xvii) That the Second Amended Complaint set forth any claim for which any statute any relief could lawfully be granted.

(xviii) That the said Second Amended Complaint raised any valid or legally cognizable issue or presented any actionable claim.

(xix) That, consistent with the statutory intent, the second proviso of 29 U.S.C. § 411(a)(4) may be enforced by any labor union or group of labor unions by means of an "equity action" such as set forth in Count I of the Second Amended Complaint herein.

And, separately from the foregoing, Intervenors appeal from the denial by the District Court of an opportunity to avail themselves of the right granted to them by the Order below dated March 8, 1976, to submit ". . . evidence on the question whether the Plaintiffs set forth in paragraph 10 of the Amended Complaint were at the time of those actions union-member employees. . . ."; since this is a genuine issue of material fact for the Intervenors alone which remains in dispute.

Dated: 5 July, 1977

Respectfully submitted,

Godfrey P. Schmidt, Esquire
Suite 1606
654 Madison Avenue
New York, New York 10021
(212) 371-7290

Glenn H. Carlson, Esquire
Perito, Duerk and Carlson, P.C.
Suite 1200
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8300

Attorneys for Intervenors

Notice of Appeal of Plaintiffs, July 1, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INC., et al.,

Plaintiffs,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., et al.,

Defendants.

Civil Action
No. 839-73

NOTICE OF APPEAL

Notice is hereby given that plaintiffs appeal to the United States Court of Appeals for the District of Columbia Circuit from the District Court's Order of June 2, 1977 insofar as it:

1. Orders, adjudges and decrees that the second proviso to 29 U.S.C. §411(a) is unconstitutional as applied to the defendant-Foundation because it infringes on the first amendment rights of the Foundation and its contributors; and

2. Orders that summary judgment on defendants' first counterclaim be granted; and

3. Orders that summary judgment on Count I of the second amended complaint be granted for defendants; and

4. Orders that plaintiffs' motion for interlocutory summary judgment and preliminary injunction be denied; and

5. Orders that Count II of the second amended complaint be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

Joseph L. Rauh, Jr.
John Silard
Mary M. Levy
Rauh, Silard and Lichtman
1001 Connecticut Avenue,
N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs

Memorandum Opinion of United States District Court, June 2, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL UNION UAW, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No.
	:	839-73
	:	
NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., et al.,	:	
	:	
Defendant.	:	

MEMORANDUM

Introduction and Background

This Court has issued two published opinions, *see* 366 F. Supp. 46 (1973); 376 F. Supp. 1060 (1974), and numerous unpublished orders over the long history of this litigation which commenced in 1973. The United States Court of Appeals for this Circuit has also published an opinion in this case. *See* 510 F.2d 1239 (1975). That opinion denied defendants' petition for mandamus against this Court relating to the jurisdiction of the Court, outstanding discovery orders, and other matters. On June 16, 1975, the Supreme Court denied certiorari. 422 U.S. 1008 (1975).

Notwithstanding the efforts of this Court, and despite the numerous hearings and orders in this protracted litigation, the defendants have steadfastly disobeyed the orders of this Court and have refused to disclose to the plaintiff unions the names of their contributors. This continued and willful

disregard of the Court's orders has forced the Court, in the interests of justice, to invoke certain of the sanctions authorized by Rule 37 of the Federal Rules of Civil Procedure.1 As a result of defendants' continued refusal to comply with the Court's discovery orders plaintiffs have been precluded from obtaining from defendants evidence and crucial to plaintiffs' claims; the Court has, therefore, pursuant to Fed.R.Civ.P. 37(b)(2)(A), deemed established for the purposes of this litigation those facts material to Count I of the second amended complaint which it would be unjust and unfair to require plaintiffs to prove in the absence of the discovery to which they are entitled.

This case is now before the Court on various motions by the parties, including plaintiffs' motion for interlocutory summary judgment and preliminary injunction based on the facts deemed established by this Court's aforesaid Rule 37 orders. The defendants1 have alleged as a counterclaim, and for all practical purposes by way of defense to Count I,

---

1. Rule 37(b) of the Federal Rules of Civil Procedure authorizes the court in which an action is pending to enforce its discovery orders by such orders against a noncomplying party as are just. Among the sanctions specifically authorized by Rule 37(b) are: an order designating facts as established in accordance with the claim of the party seeking discovery; an order refusing to permit a disobedient party to oppose designated claims, or prohibiting that party from introducing certain matters into evidence; an order striking pleadings or dismissing the action or any part thereof; an order treating as contempt of court the failure to comply; and an order requiring a noncomplying party to pay the reasonable expenses, including attorneys' fees, incurred by the party seeking discovery.

1a. The defendants herein are the National Right to Work Legal and the National Right to Work Committee (hereinafter, "Committee").

that in spite of the facts deemed established by the Court pursuant to Rule 37, plaintiffs' claim for relief in Count I is barred by the fact that the statutory provision upon which that claim is based—the proviso to section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4)—is, as applied, unconstitutional in that it infringes on the first amendment rights of the defendant Foundation and its contributors.

At the last hearing herein, on April 26, 1977, the Court announced, *inter alia*, that it wanted the benefit of any additional materials the parties wished to submit and that this case had to be decided, once and for all, so that the matter could be readied for appellate review. The Court also advised the parties, upon reconsideration with respect to Count II of the second amended complaint, that it might have erred in 1973 in holding plaintiffs had an implied private right of action to enforce the reporting requirement of 29 U.S.C. § 433(b)(1) directly against allegedly noncomplying employers. Accordingly, the Court asked for additional briefs on this issue.

Upon consideration of all the motions now pending before the Court, all the papers filed by the respective parties in support of an in opposition to these motions, the arguments of counsel in open court, and the entire record herein, the Court concludes, on the basis of the entire record herein2 and for the reasons hereinafter stated, that plaintiffs have established all the elements of a Foundation violation of the proviso to 29 U.S.C. § 411(a)(4) with

---

2. The record herein of course includes the Rule 37 Order entered by this Court on January 26, 1976, and the Rule 37 Order entered of even date herewith pursuant to the Court's Order to Show Cause of May 11, 1976.

regard to most of the allegedly Foundation-funded lawsuits set forth in paragraph 10 of the second amended complaint. The Court concludes, however, that insofar as the proviso to 29 U.S.C. § 411(a)(4) proscribes these Foundation activities, the absolute statutory prohibition on interested employer or employer association funding of legal proceedings by union members against their unions violates the first amendment rights of the Foundation and its contributors; the statute, therefore, must be deemed to be void and unenforceable as applied to the defendant Foundation. Accordingly, the Court will deny plaintiffs' motion for interlocutory summary judgment and preliminary injunction and will instead grant summary judgment for the defendants on Count I of the second amended complaint and grant defendants summary judgment on their first counterclaim for declaratory relief.3 Finally, upon further consideration

3. The Court recognizes that this case is presently in a somewhat unusual posture. Plaintiffs have moved for interlocutory summary judgment on the statutory violation issue regarding Count I of the second amended complaint pending adjudication of the constitutionality of the proviso to 29 U.S.C. § 411(a)(4) as applied to the defendant Foundation. Neither side, however, has formally moved for summary judgment on Count I in its entirety or on defendants' first counterclaim, which seeks a declaratory judgment that the proviso to 29 U.S.C. § 411(a)(4) is unconstitutional as applied to the Foundation.

Nevertheless, upon review of the entire record herein, and based on the Court's interpretation, as hereinafter articulated, of the applicable constitutional precedents, the Court concludes that no facts alleged by plaintiffs herein, even if proved, would render the proviso to 29 U.S.C. § 411(a)(4) constitutional as applied to the defendant-Foundation. Thus, there are no *material* facts genuinely in dispute with regard to the constitutional issue set forth in the counterclaim and pleaded as a defense to Count One, both of which are being adjudicated herein.

In view of the foregoing conclusion that there are no material facts in dispute as to the constitutional issue, and because both sides have had a

(continued)

of its initial ruling, *see* 366 F. Supp. 46, 49-51 (D.D.C. 1973), the Court concludes that plaintiffs do not have a private right of action to seek judicial enforcement of the reporting requirement of 29 U.S.C. § 433(b)(1) directly against allegedly noncomplying employers, and the Court will therefore, *sua sponte*, dismiss Count II of the second amended complaint.

(footnote continued from preceding page)

full opportunity, both at oral argument and in written memoranda, to address the constitutional issue decided herein, and particularly because plaintiffs, against whom these summary judgment(s) are granted, have unequivocally stated that "the record now contains all the facts necessary for the Court's disposition of defendants' constitutional objection," Plaintiffs' Memorandum of May 12, 1977, at 19, the Court concludes that summary judgment is appropriately granted for defendants both on Count I of the second amended complaint and on their first counterclaim for declaratory relief. "To conclude otherwise would result in [an] unnecessary [trial] and would be inconsistent with the objective of [Fed.R.Civ.P.] 56 of expediting the disposition of cases." C. Wright & A. Miller, *Federal Practice and Procedure*, § 2719, at 455 (1973).

The summary judgment for defendants on Count I will also extend to those law suits in paragraph 10 of the second amended complaint with respect to which the Court hereinafter concludes that plaintiffs have not yet established all the facts necessary to determine a statutory violation. *See* section I, *infra*. Notwithstanding that plaintiffs might be able to prove at trial the facts that the Court has found to be either in dispute or insufficiently developed and, thus, prove a violation of the proviso to 29 U.S.C. § 411(a)(4), the unconstitutionality of the proviso as applied to the defendant Foundation would preclude the Court from granting plaintiffs any relief. Thus, defendants are entitled as a matter of law to summary judgment with regard to these "disputed" law suits also.

I. Plaintiffs Have Established That The Foundation Has Violated The Proviso To U.S.C. § 411(a)(4) By Funding Union Members In Certain Suits Against Their Unions.

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(4) provides in relevant part:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, . . . That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.4

Plaintiffs allege that the defendant Foundation has violated the last proviso of this section by using funds provided by "interested employers" to support labor organization members in a number of suits against their labor organizations.

The suits that allegedly have been funded in violation of this section are listed in paragraph 10 of the second amended complaint herein. They are:

(1) *Reid v. McDonnell Douglas Corp.*, N.D. Okla., C.A. No. 67-0-224, filed September, 1967.

4. The proviso at the end of 29 U.S.C. § 411(a)(4) is actually the second proviso to that section. However, since the first proviso to that section is not here in issue, the Court will refer to the second proviso as "the proviso to 29 U.S.C. § 411(a)(4)."

(2) *McNamara v. Johnston*, N.D. Ili., C.A. No. 71C654, filed March, 1971.

(3) *Gabauer, et al., v. Woodcock, et al.*, E.D. Mo., C.A. No. 72C180(A), filed March, 1972.

(3a) *Gabauer v. Woodcock, et al.*, E.D. Mo., C.A. No. 72C164(2), filed March, 1972.

(3b) *Huskey v. Woodcock, et al.*, E.D. Mo., C.A. No. 72C165(4), March, 1972.

(4) *Seay v. McDonnell Douglas Corp.*, C.D. Cal., C.A. No. 67-1394-HP, filed September, 1967.

(5) *Marker v. Connally*, D.D.C., C.A. No. 2486-71, filed December, 1971.

(6) *Walsh v. Connally*, C.D. Cal., C.A. No. 71-3062-IH, filed December, 1971; transferred to D.D.C., C.A. No. 748-72.

(7) *Buckley v. American Federation of Television and Radio Artists, S.D.N.Y.*, 71 Civ. 146, filed June, 1971.

(8) *Evans v. American Federation of Television and Radio Artists*, S.D.N.Y., ?? Civ. 3920, filed September, 1971.

(9) *Lewis v. American Federation of Television and Radio Artists*, N.Y. Sup. Ct., N.Y. Co., filed November, 1971.

(10) *Mendoza v. United Farm Workers Organizing Committee*, E.D. Cal., C.A. No. F-449 Civil, filed September, 1970.

(11) *Gabaldon v. United Farm Workers Organizing Committee*, Cal. Sup. Ct., Tulare Co., No. 70106, filed August, 1970.

(12) *Ponciano v. United Farm Workers Organizing Committee*, Cal. Sup. Ct., Kern Co., No. 111447, filed October, 1970.

(13) *Braden v. Herman*, W.D. Mo., C.A. No. 2784, filed September, 1971.

(14) *Lay v. Construction, Production and Maintenance Laborers' Union, Local No. 383*, Ariz. Sup. Ct., Maricopa Co., No. 31374, fiiled May, 1972.

(15) *Richardson v. Communications Workers of America, AFL-CIO*, D. Neb., C.A. No. 02673, filed December, 1966.

(16) *Ferro v. Hercules, Inc.*, Va. Cir. Ct. in Chancery, Pulaski Co., filed November, 1968.

(17) *Adams v. City of Detroit*, Wayne Co., Mich. Cir. Ct. Case No. 159940, filed June, 1970.

(18) *Havas v. Communications Workers of America*, N.D.N.Y., C.A. No. 75-CV-268, filed May, 1975.

(19) *Lohr v. Association of Catholic Teachers*, E.D. Pa., C.A. No. 75-1910, filed July 2, 1975.

(21) *Dean v. Local 164 IBEW*, S.D.N.Y., C.A. No. 74 Civ. 1944, filed May, 1974.

(21a) *Turpin v. NLRB*, Case No. 22-CB-2455, filed July, 1973.5

With regard to all of these suits *except Gabauer v. Woodcock, et al.*; *Huskey*; *Braden*; *Lay*; *Richardson*; *Ferro*; *Havas*; and *Lohr*, it is undisputed that the defendant Foundation has funded at least one full union member in the

5. The cases alleged in paragraph 10(20) of the second amended complaint have already been disposed of by the Court's orders of March 8, 1976, and May 6, 1976, denying plaintiffs' motion to add paragraph 10(20) to the second amended complaint.

litigation against his labor organization,6 and there can be no doubt that these suits are "actions in any court" within the meaning of 29 U.S.C. § 411(a)(4), as previously interpreted by this Court. *See* 376 F. Supp. 1060 (D.D.C. 1974). Thus, it appears that the only material issue that plaintiffs must prove to establish a violation of the proviso to 29 U.S.C. § 411(a)(4) for the funding of these suits is whether the Foundation is an "interested employer or employer association" within the meaning of the statute.

The Court agrees with plaintiffs that the Rule 37 orders entered by this Court on January 26, 1976, and by a separate order of even date herewith because of the continued and willful failure of defendants to comply with the discovery orders of this Court establish that the defendant Foundation is an "interested employer association" that acts as a conduit to permit "interested employers" to fund union members in litigation against their labor organizations. These orders, deeming established for the purposes of the instant litigation certain facts that it would be unjust and unfair to require plaintiffs to prove without the benefit of the discovery to which this Court has held they are entitled, together establish:

(I) That a majority of the financial contributors to the defendant Foundation are employers who (1) have contracts or other relationships with some of the

6. It remains in dispute whether the Foundation has funded the *Gabauer v. Woodcock, et al.*, and *Huskey* cases; and facts concerning membership status are either disputed or not sufficiently developed to permit determination of a Foundation violation *vel non* with regard to the *Braden, Lay, Richardson, Ferro, Havas*, and *Lohr* cases. Nevertheless, for the reasons stated in note 3 *supra*, the summary judgment granted herein to defendants by the Court will extend to those cases also.

plaintiff unions herein; (2) are in the same lines of business in which some of the plaintiff unions herein engage in organization; (3) have union security agreements of their own whose validity or operation may be affected by suits which the defendant Foundation is supporting; (4) have contributed to the anti-union activities of the defendant Committee; and (5) have in other ways manifested their opposition to organized labor.

(II) That such employers have a concrete interest in and would be affected by the lawsuits set forth by plaintiffs in their complaint.

(III) That a majority of the defendant Foundation's funds derive from the contributions of such employers.

(IV) That the financial contributions made by such employers to the Foundation have been given by the Foundation to the plaintiffs in the lawsuits set forth in the complaint for the purposes of financing and encouraging said litigation.

(V) The Foundation (aided by the Committee) has financed, encouraged, managed and participated (other than as a party) in suits instituted by employees and members of labor organizations, which challenge their financial obligations to the union which is their collective bargaining representative. In those activities, the Foundation has been acting as an agent and conduit for employers interested in promoting such suits in order to (1) promote their self-interest in restricting the permissible scope of legality of union security provisions to which they have agreed, been asked to agree, or expect to be required to agree; (2) weaken the dues resources of labor organizations with which they have or anticipate having collective bargaining or other relationships; and (3) generally establish legal limitations on union security and union political activities which enhance union strength vis-a-vis such employers.

These facts establish that the defendant Foundation is an "interested employer association" within the meaning of the proviso of 29 U.S.C. § 411(a)(4). Thus, by financing union members in litigation against their labor organizations, the Foundation has violated the proviso to 29 U.S.C. § 411(a)(4). In addition, the foregoing facts prove that the defendant Foundation has also violated the same proviso by acting as a *conduit* for "interested employers" and using their financial contributions to fund union members in litigation against their labor organizations.

II. While the Defendant Foundation Has Violated The Proviso to 29 U.S.C. § 411(a)(4), That Proviso Is Void And Unenforceable Against The Foundation Because, As Applied, It Violates The First Amendment Rights Of The Foundation And Its Contributors.

Having concluded that the plaintiffs herein have proved all that is necessary to establish that the Foundation has funded union members in litigation against their labor organizations in violation of the proviso to 29 U.S.C. § 411(a)(4), it is necessary to consider defendants' contention that the proviso is unconstitutional as applied and therefore void and unenforceable against the Foundation.

The Court is mindful of the statement of the Court of Appeals in its opinion in this case that the constitutional issues herein cannot be decided "without a determination of what type of organization the Foundation is in fact." 510 F.2d 1239, 1243. However, after consideration of the entire record herein, and the facts established by the record herein as to the role the defendant Foundation has played in funding union members in lawsuits against their labor

organizations, the Court concludes that no other facts concerning the organizational nature of the Foundation are necessary for adjudication of defendants' constitutional counterclaim defense. Plaintiffs' counsel agrees. *See* Transcript (4/26/77) at 65, 67 *et seq.*

The proviso to 29 U.S.C. § 411(a)(4) literally prohibits the Foundation (hereinbefore determined to be an "interested employer association") from *any* direct *or* indirect financing or encouragement of, or participation in, *any* action, proceeding, appearance, or petition by a member of a labor organization. Despite the unrestricted breadth of th a labor organization. Despite the unrestricted breadth of the proviso's proscription, the only issue raised by the application of the proviso to the Foundation is whether Congres can, consistent with the first amendment, absolutely prohibit the Foundation from *funding* litigation ("court actions") by union members against their labor organizations. The Court concludes that Congress may not constitutionally so restrict the first amendment rights of the Foundation and its contributors.

Defendants contend, and the Court so finds, that the proviso to 29 U.S.C. § 411(a)(4) *clearly, directly*, and *absolutely* interferes with the first amendment rights of petition, association, and speech of the Foundation and its contributors. It is well-established that "the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). It s also well-established that "the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co. v. Trucking*

Unlimited, 404 U.S. 508, 510 (1972). While "grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones," *United Mine Workers v. Illinois State Bar Association*, 389 U.S. at 223, *quoting Thomas v. Collins*, 323 U.S. 516, 531 (1945), the first amendment has traditionally been construed strictly in cases involving political expression. As the Supreme Court recently reaffirmed, its "decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First [Amendment]. . . ." *Abood v. Detroit Board of Education*, 45 U.S.L.W. 4473, 4480 (May 23, 1977). This Court finds that, for the Foundation, as the Supreme Court found for the NAACP in the seminal case of *NAACP v. Button*, 371 U.S. 415 (1963), "association for litigation may be the most effective form of political association." 371 U.S. at 431. Thus, the Court concludes that the proviso to 29 U.S.C. § 411(a)(4), by absolutely prohibiting the Foundation and its contributors from joining with union members in suits challenging certain practices of their labor organizations, interferes directly with the rights of petition, association, and speech protected by the first amendment.

It is significant to note that nowhere in their papers do plaintiffs contest the above conclusion; rather, they rely on their argument that notwithstanding the infringement of first amendment rights, the proviso is constitutional because it serves a *"compelling state interest."* Of course, plaintiffs are clearly correct in asserting that the first amendment rights of petition, association, and speech are not absolute: There can be no doubt that if the proviso's infringement on first amendment rights is justified by a "sufficiently compelling" governmental interest, *Wooley v. Maynard*, 45

U.S.L.W. 4379, 4382 (April 20, 1977), and if the means chosen to effectuate that governmental interest is "closely drawn to avoid unnecessary abridgement of [first amendment] freedoms," *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), then the proviso would be constitutional. However, "[i]n view of the fundamental nature" of the first amendment rights infringed upon by the proviso, the Court must subject the proviso "'to the closest scrutiny.'" *Id., quoting NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

Plaintiffs have asserted two governmental interests in barring "interested employer[s] and employer association[s]" from funding litigation brought by union members: (1) the prevention of interference by employers in the relations between unions and their members; and (2) the prevention of employer abuse of employees' 29 U.S.C. § 411(a)(4) rights. Plaintiffs contend, as they must, that both of these governmental interests are compelling.

The Court has given careful consideration to plaintiffs' argument, but the Court concludes that neither of the governmental interests in the regulation of labor-management relations is "sufficiently compelling" to justify the direct and absolute infringement on the first amendment rights of the Foundation and its contributors that is imposed by the proviso to 29 U.S.C. § 411(a)(4).7 Even if the governmental interests served by the proviso were sufficiently compelling to justify *some* abridgement of first amendment rights, it is manifestly clear that the "unlimited and indiscriminate sweep of the statute" and its "com-

7. As the Supreme Court counseled in Elrod v. Burns, "care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice." 427 U.S. at 362.

prehensive interference" with the first amendment rights of the Foundation and its contributors "goes far beyond what might be justified. . . ." *Shelton v. Tucker*, 364 U.S. 479, 490 (1960). "It has become axiomatic that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *United States v. Robel*, 389 U.S. 258, 265 (1967), *quoting NAACP v. Button*, 371 U.S. 415, 438 (1963). Thus, even where a governmental purpose is

> legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Wooley v. Maynard, 45 U.S.L.W. at 4382, *quoting Shelton v. Tucker*, 364 U.S. at 488.

The proviso to 29 U.S.C. § 411(a)(4) is certainly not narrowly drawn to minimize the infringement on first amendment rights; nor do the benefits gained by operation of the proviso "outweigh the loss of constitutionally protected rights." *Elrod v. Burns*, 427 U.S. at 363. If Congress wants to effectuate the governmental interests in the regulation of labor-management relations which are purportedly served by the proviso, then it "must achieve its goal by means that have a 'less drastic' impact on the continued vitality of First Amendment rights." *United States v. Robel*, 389 U.S. at 268. *Accord, Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). The proviso to 29 U.S.C. § 411(a)(4), as it now stands, is unconstitutional as applied to the Foundation because it infringes on the first amendment rights of the Foundation and its contributors, and it is therefore void and unenforceable as against the Foundation.

III. Plaintiffs May Not Enforce The Reporting Requirements Of 29 U.S.C. §433(b)(1) By A Private Right Of Action Directly Against The Allegedly Non-complying Employers.

At the hearing held herein on April 26, 1977, the Court, *sua sponte*, raised the question of whether it had erred it its Memorandum Opinion of October 24, 1973, 366 F. Supp. 46, in denying defendants' motion to dismiss Count II of the complaint. In that opinion, the Court inferred "an implied right of action in the statute," *id.* at 50, that enabled plaintiffs herein to sue the defendants herein in order to compel their compliance with section 203(b)(1) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 433(b)(1). At the April 26, 1977 hearing, the Court requested supplementary memoranda from the parties on this question.

Upon further consideration, the Court concludes that 29 U.S.C. § 433(b)(1) is *not* enforceable by a private action directly against the allegedly noncomplying employer. Rather, the Court concludes that *only* the Secretary of Labor, pursuant to section 210 of the LMRDA, 29 U.S.C. § 440, may bring a civil action to enforce directly the Act's reporting requirements. This construction of the Act appears most consonant with congressional intent as evidenced by the overall statutory scheme of the LMRDA. Of the Secretary determines not to institute such an enforcement action after petition by a private party (such as plaintiffs' herein), then that party may institute an action against the Secretary challenging his decision not to enforce the Act's reporting requirements. *Cf. Dunlop v. Bachowski*, 421 U.S. 560 (1975).8 Thus, Count II of the second

8. Such a suit against the Secretary of Labor must be preceded by the exhaustion of administrative remedies. In the present case, the plaintiffs have already exhausted their administrative remedies. *See* 366 F. Supp. 46, 51-52 (D.D.C. 1973).

amended complaint fails to state a claim upon which relief can be granted, and the Court will, *sua sponte*, dismiss Count II from the complaint.

IV. CONCLUSION

For the reasons stated above, the Court will (1) grant summary judgment for defendants on Count I of the second amended complaint, (2) grant summary judgment for defendants on their first counterclaim for declaratory relief, and (3) dismiss Count II of the second amended complaint.

An Order in accordance with the foregoing will be issued of even date herewith.

DATE: June 2, 1977

/s/ Charles R. Richey

Charles R. Richey
United States District Judge

Order of the United States District Court,
June 2, 1977

UNITED STATES DISTRICT COU.
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL UNION UAW, et al.,	:	C. A. No. 839-73
Plaintiffs,	:	
v.	:	
NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., et al.,	:	
Defendants.	:	

ORDER

Upon consideration of the various motions pending herein, the oppositions thereto, the respective points and authorities in support thereof and in opposition thereto, the arguments of counsel in open court, and the entire record herein, and for the reasons set forth in this Court's Memorandum issued at even date herewith, it is, by the Court, this 2nd day of June, 1977.

ORDERED, that defendants' motion to take oral discovery under seal and defendants' motion to take written discovery under seal be, and the same hereby are, denied, it appearing to the Court that these means of tendering the discovery information sought by plaintiffs, which was previously ordered produced by the Court, are a mere afterthought and comply neither in substance nor in spirit with the outstanding discovery orders of this Court, and it further appearing that these motions do not represent a good faith effort by defendants to comply with the Court's outstanding discovery orders; and it is

FURTHER ORDERED, that pursuant to Fed.R.Civ.P. 37(b)(2)(A) and the Rule to Show Cause issued by the Court on May 11, 1976, and because defendants have willfully continued to disobey the discovery orders of this Court, it shall be taken as conceded for the purposes of this litigation that a majority of the financial contributors to the defendant National Right to Work Legal Defense and Education Foundation, Inc., are employers that have a concrete interest in and would be affected by the law suits in paragraph 10 of the second amended complaint as a result of the facts deemed to be established by the Court's Rule 37 Order of January 26, 1976; and it shall further be taken as conceded that a majority of the defendant Foundation's income derives from the contributions of such employers; and it is

ORDERED, ADJUDGED, AND DECREED, that, notwithstanding the facts deemed established by the aforegoing ordered paragraph and this Court's Rule 37 Order of January 26, 1976, the proviso to 29 U.S.C. §411(a)(4) is unconstitutional as applied to the defendant-Foundation because it infringes on the first amendment rights of the Foundation and its contributors; and it is

FURTHER ORDERED, that summary judgment on defendants' first counterclaim be, and the same hereby is, granted for defendants; and it is

FURTHER ORDERED, that summary judgment on Count I of the second amended complaint be, and the same hereby is, granted for defendants; and it is

FURTHER ORDERED, that plaintiffs' motion for interlocutory summary judgment and preliminary injunction be, and the same hereby is, denied; and it is

FURTHER ORDERED, that Count II of the second amended complaint be, and the same hereby is, dismissed for failure to state a claim upon which relief can be granted; and it is

FURTHER ORDERED, that all other motions pending herein be, and the same hereby are, dismissed as moot; and it is

FURTHER ORDERED, that because of the aforegoing, this case is now concluded and shall be stricken from the Court's docket.

/s/ Charles R. Richey
United States District Judge

Partial Transcript of United States District Court Hearing, April 26, 1977

TRANSCRIPT OF PROCEEDINGS

The Clerk. Civil Action 839-73, International Union versus National Right to Work Legal Defense.

The Court. I see we have the Bar Association here again today.

Madam Clerk. Let's see who is here.

The Clerk. Will Counsel please state their name and whom they represent for the record?

Mr. Rauh. For the record, Your Honor, my name is Joseph L. Rauh, Jr., for the Plaintiffs. This is Mr. John Silard, my partner, and Mr. Steve Schlossberg, who is the General Counsel of the United Automobile Wokers.

The Court. All right.

Mr. Jackson. May it please the Court, representing the Defendants, my name is Thomas S. Jackson, and I am accompanied by others who will identify themselves one at a time.

The Court. All right.

Ms. Gurne. Patricia Gurne.

Mr. Olson. William J. Olson.

The Court. And whom do you represent, Mr. Olson? Pardon me, sir.

Mr. Olson. Representing the Defendants.

The Court. All right.

Mr. Kilcullen. John L. Kilcullen.

Mr. Schmitd. Godfrey Schmidt representing the Intervenors.

The Court. What Intervenors?

Mr. Schmidt. I beg your pardon?

The Court. Which Intervenors?

Mr. Schmidt. Marker, et al.

The Court. All right.

Mr. Carlson. Glenn Carlson, likewise, the Intervenors, Marker, et al.

The Court. All right.

Mr. Reed. Rex Reed, representing the Defendants.

Mr. Harper. Conrad K. Harper, representing the Defendants, Your Honor.

Mr. Parkinson. Kenneth Wells Parkinson, representing the Defendants.

The Court. Is that it? All right, gentlemen.

This case has been pending for a long time, as you all know, and I want to seek counsel's assistance to develop the matter fully and completely, so that we can get this case in a posture, not only to decide the questions raised by Count One of the amended complaint, but also Count Two, and the questions raised by the Defendants' counterclaim.

The Court has been reviewing the papers and the sequence of events that have occurred over the last several months and the period of time since you all were last here, and prior to that, and has come to the conclusion that it needs your help with respect to several matters.

Before going into that, however, I just want to make certain that the Court's understanding of the matters that are sub judis is correct, in the light of the voluminous file.

Mr. Rauh, you can perhaps help me with respect to this, and then whoever wishes to speak, Mr. Jackson, Mr. Parkinson, with respect to the Defendants, or others, can

assist in response thereto.

The Court still has the order to show cause that it issued back in May, on May 11th, to be precise, of 1976.

If you will be kind enough, both sides, to list these, and then you can tell me whether or not these are all that are exant.

Next, we have the Defendants' motion to take oral discovery under seal, the Defendants' motion for written discovery under seal, the Defendants' motion to compel answers to set No. 4 of the interrogatories, and a third document request.

The Court also has, No. 5, their motion for a rule 36(A) request for admissions.

There is, No. 6, the Defendants' motion to compel answers to set No. 5 of the interrogatories.

No. 7, the Plaintiffs' motion for a protective order.

No. 8, the Defendants' motion to strike the Brown and Brehm affidavits.

No. 9. the Defendants' motion to file an amended answer to the second amended complaint of the Plaintiffs.

And, No. 10, the Defendants' motion for partial summary judgment on various aspects relating to the Plaintiffs' first claim as set forth in Count One.

And, No. 11, the Plaintiff's motion for intelocutory summary judgment and preliminary injunction.

Now, the first question is:

Does this represent all of the outstanding matters that are before the Court?

If I have overlooked anything, I would like to be told now.

Mr. Jackson. Can we take just a moment to confer here?

The Court. Oh, yes, take your time. If you want me to repeat this, Mr. Jackson, I would be glad to do so.

Mr. Rauh. Maybe I could speak while they are con-

ferring.

The Court. Perhaps you had better let them finish their conference.

If you would like me to repeat this on either side, I will do so.

Mr. Jackson. I, personally, think I have them all written down, Your Honor.

* * *

Gentlemen and Miss Gurne, if you will be kind enough to (A) let me have your views within the confines of the limitation of the rules regarding pages on whether or not the Court erred with respect to the court's earlier holding back in 1974, that the Plaintiffs could sue the named Defendants herein directly without naming the Secretary of Labor, the Court would be grateful.

And I think you know what I am talking about there. That deals with the Secretary's alleged failure to enforce the reporing requirements of the Act, et cetera, on the grounds that his failure was arbitrary and capricious.

I feel that I need further briefs on that question.

Mr. Rauh, if you can let me have that within, say, how much time, five days?

Mr. Rauh. This is the 26th, Your Honor.

The Court. Could you let me have it by early next week, say, Tuesday?

Mr. Rauh. Are you addressing it to me, Your Honor?

The Court. Yes. I am also looking at the calendar.

Mr. Rauh. Well, shall we do it a week from today? That would be the — that would be the 3rd of May. That would be a week from today, Your Honor.

The Court. All right, the 3rd, the close of business on

May, the 3rd.

Mr. Rauh. And that is for both sides?

The Court. Now, just a minute.

Could you respond by the close of business on the 10th?

Mr. Jackson. All right.

The Court. All right.

Then, I direct Counsel to confer before the close of this week; but, before doing so, I am going to direct the counterclaimants, who are the Defendants in this suit, to set forth the facts which they would expect to establish through discovery as a necessary predicate for their constitutional claims in their counterclaims, and not just take it over to Mr. Rauh's office, but to give it to him, and then to have a thorough conference before the close of this week.

You can do this at your own convenience, but I want it done before 4:00 p.m., on Friday.

Mr. Harper. Your Honor, if I may be heard?

The Court. Yes, sir.

Mr. Harper. Since the Court has specifically directed me with respect to this —

The Court. I don't care. The whole defense team.

Mr. Harper. I would like to be involved, if the Court please.

The Court. I am sure I would like to have you involved.

Mr. Harper. Thank you.

I have, however, a commitment to teach a seminar at Yale Law School on Fridays, I would appreciate it if the Court could make it by Monday.

The Court. I am just looking out at Mr. Parksinson, Mr. Jackson, and a number of other Lawyers at the table. Not that you are not extremely capable, but they are capable, too.

Mr. Harper. I am sure they are, more than I, Your Honor.

The Court. I am not going to get into that, but we have waited all this time. I suppose you could say, well, Judge, why don't you be reasonable and let me go to New Haven, or something.

But I want to get this done. I think you are entitled to it. Do what you can before you have to leave and get one of your associates to do it before Friday afternoon.

That will, hopefully, resolve the counterclaim.

If you are unable to agree with respect to the factual predicates which give rise to your so-called counterclaims, you file a pleading.

I don't want you calling my chambers, either side. File a pleading and let me know, and I will have to decide at that point what we have to do.

Also, Mr. Rauh, I don't think there are any facts that you need, or any issue that arises with respect to your so-called second count we need to deal with, others than the one I have mentioned, is there?

Mr. Rauh. Not at this time, Your Honor, no.

The Court. If you think of any factual predicates that are necessary, beyond what we are talking about, I wish you would let me know by one week from now; the same for you, two weeks from now.

Because I think, as I said before — and I have repeatedly said this afternoon — I would like to get all issues decided in one order, if possible. I underscore the words "if possible."

It may not be possible, but it is, in my opinion, as I have examined this.

Now, is there anything else that anybody wants to tell the Court this afternoon? Now, the sooner you get this material to me, the sooner you are going to hear from me.

Oh, Andy reminds me of one thing.

If you are able to agree, as I suspect you will be able to, by the end of this week, do you think you will be able, by the following Tuesday, Mr. Jackson and Associates, to give me your legal position with respect to the constitutional question that I raised?

Mr. Jackson. How soon, sir?

The Court. By May 3rd.

And, Mr. Rauh, would you be able to respond by May 10th?

Mr. Rauh. Yes, Your Honor.

The Court. All right.

I think if we do that by the end of the month, you can expect — I know this is a dangerous thing for a Judge to do, but you can expect — by no later than the 31st to have my decision, hopefully.

Either side can say whatever they want in the Apellate Courts.

Mr. Jackson. When you are referring to the constitutional questions involved —

The Court. Yes.

Mr. Jackson. (Continuing) — you are talking about the whole picture.

The Court. The counterclaims.

Mr. Jackson. On the counterclaims.

The Court. The only constitutional issues that I know that are extant in the case are in the counterclaims you raised with respect to — that are found in your answer to the second amended complaint.

Isn't that true?

Mr. Jackson. Well, not entirely, Your Honor. We have raised the constitutional issues with respect to the analysis of the matter in relation to the discovery procedures. Did you want any more memoranda on how we feel that the order that

you have entered, the Rule 37(B) order, violates, according to your point of view, certain provisions of the Constitution, notably the First Amendment? Do you need any more on that?

The Court. I don't think so. But if you want to give me something, you are welcome to do so.

Mr. Jackson. Yes, sir.

The Court. I don't believe the Court needs any further help on that, but I don't want to close the door on anything that either side wants to give me.

Obviously, any Judge worth his salt needs all the help he can get from Counsel. I hope I have not made everybody mad this afternoon; but, on the other hand, if I have done that, maybe I have accomplished something.

By the end of the month you will be on your way upstairs.

Mr. Jackson. Thank you, Your Honor.

The Court. Thank you.

(Whereupon, at 4:15 o'clock p. m., the Court adjourned.)

Judgment of the United States Court of Appeals Affirming Orders of the District Court Filed December 17, 1976

NOT TO BE PUBLISHED — SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1976
CIV. NO. 839-73

NO. 76-1346

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCALS 1093, 558 and 25, *et al.*,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,

and

GERALD MARKER, *et al.*,

Appellants.

Nos. 76--1346 & 76-1530

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:
BAZELON, *Chief Judge*,
LEVENTHAL and MACKINNON, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby affirmed.

Per Curiam

For the Court
/s/George A. Fisher
GEORGE A. FISHER
Clerk

Order of Charles R. Richey, U.S.D.J.,
Filed March 8, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION 839-73

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Plaintiffs,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,
Defendants.

ORDER

Upon consideration of the motion of Gerald Marker, et al., to intervene in this action, the points and authorities in support thereof and in opposition thereto, and it appearing to the Court that movants are adequately represented and should not be permitted to intervene as a matter of right, but it further appearing to the Court that permissive intervention should be allowed to afford the movants an opportunity to submit evidence on the limited issue of whether the plaintiffs in the lawsuits set forth in paragraph ten of the amended complaint were at the time of those actions union-member employees, and to submit briefs on the legal

question extant, it is, by the Court, this 8th day of March, 1976,

ORDERED, that the motion to intervene as of right of Gerald Marker, et al., be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the movants, Gerald Marker, et al., are hereby permitted to intervene permissively and for the limited purpose of submitting evidence on the question of whether the plaintiffs set forth in paragraph ten of the amended complaint were at the time of those actions union-member employees, and for the purpose of submitting briefs on the legal questions extant.

/s/Charles R. Richey
Charles R. Richey
United States District Judge

Partial Transcript of United States District Court Hearing, March 8, 1976

[TR 4]

* * *

With respect to the marker and other requests to intervene, filed on January 9, 1976, requesting intervention as a matter of right in the first instance, and permissive intervention in the second instance, the Court has decided to grant permissive intervention, with the caveat or restriction that the intervention be limited to the factual dispute before the Court, as to whether the named Plaintiffs in paragraph 10 of the complaint are, in fact, union members, and to the submission of a brief on the ultimate merits.

Now, Ladies and Gentlemen, this is a synopsis, or a very brief synopsis, of what you will find in this series of orders I hold in my hand at the present time.

* * *

[1]This portion of the transcript begins at page 4 thereof; page 447 of Volume III of the Joint Appendix in the Court below.

Federal Rules of Appellate Procedure

Rule 28.

BRIEFS

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a) (1)-(4), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the

response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court.

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

(e) References in Briefs to the Record. References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, Etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at

the end, or they may be supplied to the court in pamphlet form.

(g) Length of Briefs. Except by permission of the court, principal briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. And except by permission of the court, reply briefs shall not exceed 25 pages of standard typographic printing or 35 pages of printing by any other process of duplicating or copying.

(h) Briefs in Cases Involving Cross Appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

(i) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

Federal Rules of Appellate Procedure

Rule 31.

FILING AND SERVICE OF BRIEFS

(a) Time for serving and filing briefs. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

(b) Number of Copies to be Filed and Served. Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

(c) Consequence of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

As amended March 30, 1970, eff. July 1, 1970.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1521

GERALD MARKER, ET AL.,
Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., ET AL.,
Respondents (Defendants).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR PLAINTIFF UNION RESPONDENTS

JOSEPH L. RAUH, JR.
JOHN SILARD
ELLIOTT C. LICHTMAN
MARY M. LEVY
RAUH, SILARD AND LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Plaintiff Union Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1521

GERALD MARKER, ET AL.,
Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., ET AL.,
Respondents (Defendants).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR PLAINTIFF UNION RESPONDENTS

COUNTER-STATEMENT OF ISSUES

This is a suit by plaintiff union respondents to prevent defendant Right to Work groups from using employer funds to finance suits by union members against their unions. Petitioners-intervenors (hereinafter intervenors) are individuals suing plaintiff unions in various federal and state courts with funds and other assistance supplied by defendant Right to Work groups and they sought intervention in this case represented by counsel financed by those Right to Work defendants. The District Court denied intervenors' motion for intervention as of right on the ground that they were adequately represented by the defendant Right to Work groups and limited their permissive intervention to the question whether the plaintiffs in the law suits financed by the Right to Work groups are "union-member employees." Intervenors appealed, the Court of Appeals summarily affirmed and this Court denied certiorari. After cross-appeals from the District Court's decision on the merits, the Court of Appeals struck intervenors' brief after plaintiff unions pointed out that it went beyond the limited intervention accorded intervenors. Thus the issue presented is:

> Whether the Court below properly restricted intervenors' brief to the issue specified by the District Court in granting limited intervention.

COUNTER-STATEMENT OF THE CASE

On May 1, 1973, a number of labor unions and their affiliates (respondents-plaintiffs, hereinafter plaintiffs) filed this suit against the National Right to Work Committee and the National Right to Work Foundation, two employer-financed groups dedicated to attacking union organization and union security. Plaintiff unions' complaint asserted that these two defendant Right to Work groups are using employer money to encourage and

finance suits by dissident employees and union members against plaintiff unions, in violation of the second proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4) (1970). That proviso bars "interested employers" from "directly or indirectly" financing or encouraging suits by union members against their unions. Plaintiffs seek an injunction and other relief against the continued instigation and financing by interested employers, through the defendant Right to Work Committee and Foundation, of such suits by union members against their unions.[1]

Upon the filing of this suit, defendants immediately moved to dismiss the complaint on a variety of grounds, including objections to the jurisdiction of the Court and a claim that the "interested employer" ban of the law applies only to the immediate employer of the employee who is suing his union. On October 24, 1973, defendants' motion to dismiss was rejected by the District Court, 366 F. Supp. 46 (D.D.C. 1974), and discovery commenced immediately thereafter. On January 18, 1974, plaintiffs moved in the District Court for an order requiring defendants to reveal, under conditions of litigation confidence, the names of some 190 of the largest contributors among the more than 8000 employer contributors to the Right to Work Foundation, and on June 5, 1974, the District Court directed defendants to furnish the names sought. Three separate efforts by de-

---

[1] Intervenors' statement (Pet. p. 6) that the complaint "sought to prevent the [Right to Work] Foundation from continuing legal aid to Petitioners, among others, in actions against unions . . ." is a distortion. Respondent-plaintiffs seek only to prevent the Foundation from illegally using funds from interested employers to assist suits against unions. Far from wanting to cut off properly-financed suits by union dissidents against their unions, counsel for plaintiffs affirmatively support such actions. See, e.g., *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

fendants to obtain a review of that order in this Court were rebuffed.[2] Defendants still refused to comply with the District Court's discovery order and on January 26, 1976, that Court entered a Rule 37 order finding that "interested employers" are contributing to the Foundation's financing of suits by union members against their unions (App. 6a-7a).[3] Having entered its Rule 37 order on the contributions of "interested employers," the District Court, on its own initiative, included in this same January 26th order a show cause order why summary judgment should not be entered for plaintiffs (*id.* at 8a).

At this juncture of the case, in January of 1976, *more than two-and-a-half years after this suit was commenced*, Gerald Marker and 15 other persons filed a motion in the District Court to intervene as additional defendants. These intervenors (petitioners here) are the very plaintiffs suing their unions in actions supported by the defendant Committee and Foundation with "interested employer" contributions. The collusive character of the intervention attempt was further evidenced when the Right to Work defendants admitted that they are "fi-

---

[2] On June 27, 1974 defendants filed in the Court of Appeals an appeal and a petition for writ of mandamus to review the District Court's June 5, 1974 discovery order. On June 28, 1974 the Court of Appeals issued an order dismissing the appeal and this Court denied review thereof on January 20, 1975. 419 U.S. 1132. On March 17, 1975 the Court of Appeals issued its opinion dismissing the petition for writ of mandamus, and on April 14, 1975 this Court unanimously (Mr. Justice Douglas not participating) denied petitioners a stay. 421 U.S. 902. On June 16, 1975 this Court denied certiorari from the Court of Appeals' dismissal of the petition for writ of mandamus. 422 U.S. 1008. These impositions on the time of this Court were later conceded to be unwarranted by counsel for defendants (D.D.C. Tr. Oct. 9, 1975, at 7-8).

[3] "App." references are to the appendix in this Court on the earlier petition for certiorari, 76-1289 and "J.A." references are to the appendix in the Court below on the pending appeals on the merits. "I.A." references are to intervenors' appendix filed in this Court with the pending petition for certiorari.

nancing the intervention",[4] that "the fees and expenses of counsel for the employee-intervenors will be paid by the Foundation," [5] and that Godfrey P. Schmidt, counsel for intervenors, has been for many years a significant member of the team of lawyers working with defendants.[6]

On March 8, 1976, the District Court denied intervention of right on the ground that "movants are adequately represented" (I.A. 51a-52a), but granted permissive intervention "on the limited issue of whether the plaintiffs in the lawsuits" financed by the Foundation are "union-member employees" (I.A. 51a-52a). On April 28, 1976, the District Court struck intervenors' answer as "outside the scope of the permissive intervention granted . . ." (App. 5a). On appeal plaintiffs argued that, since intervenors' interests were adequately represented by defendant Right to Work Foundation, and their intervention

---

[4] Defendants' Response to the Motion and Request for Hearing, February 25, 1976, at 1.

[5] *Id.*

[6] Reed Larson, chief executive of both defendants, testified in deposition on February 9, 1976, that Schmidt is one of "a half dozen" or "maybe a dozen" outside counsel who handle most of defendants' cases; "[a]s outside counsel, he is one of the more active ones" (J.A. IX 1130-31). Mr. Schmidt himself asserts that he has given defendants advice and counsel over the years (Appendix in the Court below on the earlier appeal, 76-1346, at 155-56). As Mr. Rex Reed, chief house counsel for defendant Foundation admitted on deposition, this advice and counsel extended to the instant motion to intervene, on which Messrs. Schmidt and Reed consulted "prior to the time that the intervention was filed" (*id.* at 314). It is noteworthy, too, that Mr. Schmidt conceded that "since 1973, he has been one of several local counsel and consultants retained by Defendant Foundation to consult to it" (*id.* at 155) and that, as such consultant, he prepared "a lengthy complaint and an extensive brief" concerning the agency shop clause and "participated in the ensuing intra-Foundation discussion and debate for several months" (*id.* at 156). Equally significant, Mr. Schmidt obtained the names of intervenors and their local counsel in their Foundation-financed suits from defendant Foundation and solicited their intervention in that manner (*id.* at 158).

was collusive and untimely, the District Court was more than generous to intervenors in granting them even the limited permissive intervention provided in the District Court's order. On December 17, 1976, the Court of Appeals affirmed both District Court actions in a summary order (I.A. 49a-50a). On May 16, 1977, this Court denied certiorari. 97 S.Ct. 2177.

On June 2, 1977 the District Court issued its decision on the merits (I.A. 21a-37a). The Court found a violation of the statute in that a majority of the funds of the defendant Right to Work groups come from the contributions of employers with a concrete interest in the law suits financed by defendants (I.A. 29a-30a), but the Court nevertheless dismissed the complaint on the ground that the statutory prohibition on interested employer funding of legal proceedings by union members against their union violates First Amendment rights (I.A. 24a). All parties appealed—plaintiffs from the adverse decision on constitutionality, defendants and intervenors from the ruling of a statutory violation.

Intervenors' notice of appeal was not limited to the question whether the individuals suing their unions with employer funds were "union-member employees," but covered the entire spectrum of issues in the case and substantially duplicated the issues being raised by the defendant Right to Work groups which are financing the intervention. Plaintiffs moved to dismiss the appeal of the intervenors as outside the scope of the intervention permitted them by the District Court. On September 26, 1977 the Court of Appeals granted the motion to dismiss except as to matters stated on page five of intervenors' notice of appeal ("union-member employees" matters) which, the Court below said in its order, "will be the sole matters to be briefed in this appeal . . ." (I.A. 4a) by intervenors.

Despite this crystal clear limitation on the contents of intervenors' brief, instead of discussing the question they were permitted to brief, intervenors filed a 51-page brief dealing with every possible issue in the case other than the one the Court below had permitted them to address. On November 22, 1977 plaintiffs moved to strike intervenors' brief as a violation of the Court's direction to limit same to the union-member employees question. On December 21, 1977 the Court of Appeals granted the motion to strike and directed counsel for intervenors to "correct the brief, within ten days from the date of this order, to comply with the order filed herein on September 26, 1977" (I.A. 3a). On December 30, 1977 intervenors filed a motion for rehearing, stay and clarification repeating all the same arguments intervenors had earlier made against the motions to dismiss their appeal and to strike their brief. On January 23, 1978 the Court of Appeals denied the motion for rehearing, stay and clarification, adding the warning that "[t]he Court will not entertain an application for stay of mandate or other dilatory pleading" and directing counsel "to comply with the order of this Court, whatever other pleadings counsel may file" (I.A. 2a).

There is thus no genuine issue presented for this Court's review. For the petition for certiorari to review the action of the Court of Appeals in limiting intervenors' brief to the issue covered by the original District Court intervention order (summarily affirmed by the Court of Appeals with certiorari denied by this Court) only compounds the previous impositions on the time of this Court by the intervenors and the Right to Work groups financing their intervention efforts (see n. 2, *supra*).

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS FRIVOLOUS[7]

Intervenors would bring to this Court a purported right to file a brief on the merits in the Court of Appeals, although the District Court found that the intervenors "are adequately represented" (I.A. 51a) by defendant Right to Work groups and this finding has been summarily affirmed by the Court of Appeals with certiorari denied by this Court. This finding is not subject to question. Intervenors seek to argue their alleged right to maintain their suits against labor unions with the assistance of defendant Right to Work groups, which are financed by interested employers. Since the defendants are fighting for precisely that same right in this litigation, it is inconceivable that they would not be providing intervenors fully adequate representation of intervenors' interests—if only to protect their own identical interests. After all, the right to support intervenors' suits with funds of interested employers and the right of intervenors to be so supported are but two sides of the same coin. And every judge before whom this proposition has come has so held. Defendant Right to Work groups are represented in the Court of Appeals by multiple responsible counsel, headed by Whitney North Seymour, and intervenors' imposition on the time of this Court to consider once more their right to file a duplicating brief is quite unlawyerlike.

Nor is there any credible alternative argument for an all-encompassing brief by intervenors in the Court of Appeals predicated on the District Court's granting of

[7] Intervenors (Pet. p. 4) rely for jurisdiction of this Court upon the all-writs clause, 28 U.S.C. § 1651(a), and the certiorari statute, 28 U.S.C. § 1254(1). Although it is unlikely that either statute gives this Court jurisdiction to review the action of a Court of Appeals in rejecting a brief filed with it, it seems wholly unnecessary to burden this Court with a lengthy discussion of these statutes since the Court of Appeals was obviously correct and the attack upon its action is wholly frivolous.

limited permissive intervention. The Court only afforded intervenors "an opportunity to submit evidence on the limited issue" of whether the individual intervenors bringing the lawsuits "were at the time of those actions union-member employees, and to submit briefs on the legal question extant. . . ." (I.A. 51a-52a).[8] When the intervenors went beyond the "union-member employees" question in filing their answer, the District Court promptly struck it as "outside the scope of the permissive intervention granted" (App. 5a). Appealing from these two actions of the District Court, intervenors told the Court of Appeals that the intervention granted was "meaningless and feckless" (No. 76-1346, Br. p. 25) and assigned intervenors "an insignificant cameo role, more limited than even that of an amicus curiae" (No. 76-1530, Br. p. 21). And petitioning for certiorari from the Court of Appeals summary affirmance, intervenors argued to this Court that the permissive intervention was "disabling", "feckless", and "manque" and that it denied them "the ability to defend effectively their interests and rights by censoring the substantive matters they may prove or upon which they may submit legal briefs (Pet. for Cert., pp. 14-15; Reply Brief, p. 2, No. 76-1289, October Term 1976). Having tried and failed to persuade the Court of Appeals and this Court that the District Court illegally restricted their rights, intervenors are now back here saying the exact opposite—that they were *not* so restricted by the limited permissive intervention. Having sought review of the intervention order on the

[8] Intervenors misquote the District Court's March 8, 1976 order when they contend (Pet. pp. 14-15) that it "explicitly gave the right to submit 'briefs on the legal questions extant.'" The order (I.A. 51a-52a) gives the right "to submit briefs on the legal question extant." At any rate, it would make no difference if the order had read "legal questions" instead of "legal question" because the context and the interpretation by both Courts below made clear intervenors were in all respects to be limited to the "union-member employees" question.

ground that it unduly restricted their intervention and having lost therein in the District Court, the Court of Appeals and this Court, intervenors' present about-face is simply an abuse of judicial process. This Court could properly add its censure of that abuse to its action on the petition.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD
ELLIOTT C. LICHTMAN
MARY M. LEVY
RAUH, SILARD AND LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Plaintiff
Union Respondents